Supreme Court, U.S.
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No. 04-

In the Supreme Court of the United States

VERNON FRIERSON,

Petitioner,

v.

TOMMY GOETZ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Federal Wiretap Law, 18 U.S.C. § 2510, et seq. preempts, the Wiretapping and Electronic Surveillance Act of 1994, Tenn. Code Ann. § 40-6-301, et seq. and Tenn. Code Ann. §39-13-604, et seq. in the area of intercepting conversations on cordless phones.

Whether the Fourth Amendment to the United States Constitution protects a citizen's rights of privacy when using a cordless phone.

PARTIES TO THE PROCEEDING

Petitioner is a resident of the State of Tennessee and a former law enforcement officer. The Respondent is a law enforcement officer in the State of Tennessee.

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The Petitioner respectfully petitions for a writ of certiorari to review the judgment of the Sixth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Sixth Circuit Opinion (App. A) is not reported. Nor is the opinion of the District Court for Middle Tennessee. (App. B)

STATEMENT OF JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on May 19, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fourth Amendment to the United States Constitution as made applicable to the states by the Fourteenth Amendment.

The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause supported by oath, or affirmation and particularly describing the place to be searched and the persons, or things to be seized.

STATEMENT OF THE CASE

The pertinent facts of this case are: In September of 2000, the Maury County, Tennessee Drug Task Force began investigating a subject, Michael Wright, at his place of business in Columbia, Tennessee. The business was placed under twenty-four hour surveillance. During this surveillance, Wright, was observed using a cordless phone. The respondent, Officer Tommy Goetz, placed a scanner in his police car to intercept any communication on Wright's cordless telephone. In another police car, Goetz placed a second scanner and recorder. During the monitoring, Goetz overheard a conversation regarding a possible drug transaction. Goetz obtained a Court order from the Honorable Jim T. Hamilton, Circuit Court Judge for Maury County, Tennessee authorizing "the preservation, retention and continued recording of protected communications" pursuant to Tennessee Code Annotated § 39-13-604, et seq. This statute sets forth a procedure for intercepting cordless (cellular) phones in the course of a criminal investigation.

On November 10, 2000, a conversation between an individual named Bennie Collins and Wright was intercepted by the Drug Task Force. In that conversation, Collins told Wright, the petitioner, Vernon Frierson wanted to talk to him. Wright called Frierson. The subject matter of what was said during this conversation is hotly disputed. Interestingly, this conversation was not recorded by the scanner during the intercept. Frierson, who at the time was a police officer with the City of Lewisburg, was also a former city councilman for the City of Mt. Pleasant, Tennessee, the home department of Goetz. Based on the intercepted conversation, in which it was alleged by a member of the Task Force that he overheard Frierson warning Wright that he was being watched by the Task Force, Frierson was indicted on conspiracy to sell

and/or deliver cocaine. The evidence allegedly obtained from the intercepted phone call was later suppressed by the same judge who issued the intercept order, on the grounds that the Federal Wiretap Act preempted the Tennessee state statute and because Wiretap Acts procedures were not followed. Despite a dismissal of the charges against him, Frierson lost his job as a police officer.

Frierson filed suit against Goetz, for violating his Fourth Amendment right to privacy. The respondent filed a motion for summary judgment based on the grounds that his actions in using the intercept devices, and prosecuting Frierson, were subject to the good faith defense found in the Federal Wiretap Act, at § 2520(d), and thus accordingly, he should be granted qualified immunity. The District Court, the Honorable Thomas A. Higgins, agreed and dismissed the case on those grounds. The Court of Appeals upheld the District Court's decision essentially holding that preemption did not apply because of § 2520(d) and that Goetz was not aware that he was violating any federally protected right at the time he intercepted the cordless phone call.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL WIRETAP ACT PREEMPTS THE TENNESSEE STATUTE, THUS NEGATING THE GOOD FAITH DEFENSE.

The Federal Wiretap Act (Title III of the Omnibus Crime Control and Safe Streets Act) sets forth standards and procedures for the use of electronic surveillance. The Act provides civil penalties for violation of those procedures. Title 18 U.S.C. § 2510-2522 was amended in 1994 to include cordless phones. Section 2516 requires that the judge who issues an order authorizing interception of a cordless (cell)

phone communication must first determine from the testimony of the requesting law enforcement officer; (a) if there is probable cause to believe that the target of the interception is committing, has committed, or is about to commit a particular offense enumerated in 18 U.S.C. 2516; (b) there is probable cause to believe that particular conversation concerning the offenses will be obtained through such interception; (c) normal investigative procedures were tried and failed, or reasonably appears likely to fail or to be too dangerous; (d) there is probable cause to believe that the facilities from which the communication is to be intercepted is being used in connection with the commission of the offense. 18 U.S.C. § 2518(31)(a-d)(2000).

The Tennessee statutes which concern themselves with wiretaps did not, at the time of the intercept, cover cordless (cell) phones. And in fact, did not require the applying officer to prove to the issuing Judge that requirements of the Federal Wiretap Act had been met; namely, that normal investigative procedures were tried and failed, or reasonably appeared likely to fail, or to be too dangerous. Armed with the less stringent Tennessee statute, the Drug Task Force intercepted Frierson's call. Section 2520(d) of the Federal Wiretap Act provides a good faith defense to civil suits if the applying officer obtains a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization. However, the Wiretap Act does not state from what type of court, i.e.; state or federal, that such order need be obtained to qualify for the good faith defense. Nowhere in the Act is there language to the effect that the good faith defense may be afforded an officer who obtains a state order based on a less stringent state act thats procedure falls short of what Congress mandated for the Federal Wiretap Act. This is a fundamental example of the doctrine of preemption. Congressional enactments that do not exclude all state

legislation in the same field nevertheless override state laws with which they conflict. Jones v. Rath Packing Co., et al., 430 U.S. 519, 525, 97 S.Ct. 1305, 51 L.Ed.2d 504 (1977). Tennessee has also recognized preemption occurring where there is an outright or actual conflict between federal and state law. Bellsouth Telecommunications, Inc. v. Green, 972 S.W.2d 663, 670 (Tenn.Ct.App. 1997) Clearly, the doctrine of preemption applies in the instant case and would negate any good faith defense based on obtaining a state court order issued pursuant to a state law which is in conflict with the Federal Wiretap Act.

II. A CITIZEN HAS A PROTECTED RIGHT OF PRIVACY WHEN USING A CORDLESS (CELL) PHONE.

The Court of Appeals concluded that Goetz did not know he was violating a federally protected right. It should be noted that Goetz previously testified that he understood the requirements of Federal Wiretap Act at the time he convinced Judge Hamilton to issue the state order.

Congress understood that cordless and cellular phones were to be protected under the Wiretap Act when it provided penalties for violating the Act by intercepting cell phones in 1994; Title 18 U.S.C. § 2511(4)(b). It has long been the law that an illegal wiretap violates the Fourth Amendment's guarantees of privacy. Katz v. United States, 389 U.S. 347, 84 S.Ct. 1305, L.Ed.2d 576 (1967). There is no legitimate reason why a citizen of the United States should not be protected against governmental intrusion into his private conversation on a cell phone without prior judicial review.

III. THE QUESTIONS PRESENTED ARE IMPORTANT.

Two important principles of federalism are presented to this Court; whether a federal right granted to all citizens of the United States can be negated by a state action, and whether an evolving twenty-first century technology is protected by a two hundred year old right that is fundamental to democracy.

CONCLUSION

This Court, in the interest of justice, should decide the important questions raised in this petition.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-6522

[Filed May 19, 2004]

Vernon Frierson,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
Tommy Goetz,	)
Defendant-Appellee.	)
	)

On Appeal from the United States District Court
for the Middle District of Tennessee
01-00119. Higgins. 10-11-02.

BEFORE: Merritt and Moore, Circuit Judges; and Duggan, District Judge.*

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* The Honorable Patrick J. Duggan, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

MERRITT, Circuit Judge. Plaintiff Vernon Frierson, a police officer whose telephone conversation was overheard by defendant Tommy Goetz, also a police officer, appeals a grant of summary judgment on the ground of qualified immunity. Plaintiff brought this action against defendant in his individual capacity for (1) a claim pursuant to 42 U.S.C. § 1983 that defendant violated the Fourth Amendment to the United States Constitution by violating plaintiff's right to be secure in his person against unreasonable searches and for invasion of his reasonable expectation of privacy, and (2) a claim under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522, also known as the Federal Wiretap Act, when he unlawfully intercepted communications plaintiff made while talking on a cordless telephone. The plaintiff also asserts state law claims of false light and invasion of privacy, which were dismissed without prejudice below. The plaintiff also brought a claim of malicious prosecution, which was dismissed below with prejudice. For the following reasons, we affirm the judgment of the district court.

I.

FACTS

Plaintiff Vernon Frierson was a regular police officer in Lewisburg, Tennessee. Defendant Tommy Goetz was an investigative police officer in Mt. Pleasant, Tennessee, who was assigned to the Maury County Drug Task Force. In September 2000, the Maury County Drug Task Force began investigating a suspect named Michael Wright for drug distribution at his place of business in Columbia, Tennessee.

The business was placed under twenty-four hour surveillance. During that surveillance, Wright was observed using a cordless telephone. On November 8, 2000, Officer Goetz placed a scanner in his police car to intercept communications conducted over the cordless telephone. In a separate car, he placed another scanner and a recorder attached to it to record the communications intercepted by the scanner. While monitoring the scanner, Officer Goetz overheard communications between Wright and an unknown person pertaining to a possible drug transaction. Based upon this information, Goetz appeared before the Honorable Jim T. Hamilton, Circuit Court Judge for Maury County, Tennessee, to obtain an order "authorizing the preservation, retention and continued recording of protected communications pursuant to Tenn.Code Ann. § 39-13-604." the Tennessee statute that sets forth the procedures for intercepting cordless and cellular phones in the course of criminal investigations. The application was granted by the court. Goetz subsequently showed Assistant District Attorney Brent Cooper the application and order and was advised by Cooper that he had followed the applicable procedures set forth in Tenn.Code Ann. § 39-13-604(f) to record cordless telephone transmissions.

On November 9, 2000, Officer Mike Johnson of the Maury County Drug Task Force telephoned the plaintiff to inquire about Michael Wright. Officer Johnson was interested in the locations of Wright's business and residence and believed that because plaintiff worked and lived near Wright, he would be familiar with him. Defendant claims that plaintiff was informed at that time that the questions were with regard to an ongoing investigation of Wright. The plaintiff, however, disputes this and contends that he did not receive any indication that Wright was under investigation.

On November 10, 2000, a conversation between an individual named Wright and Bennie Collins was intercepted by the Drug Task Force. In that conversation, Collins told Wright that plaintiff wanted to talk to him. Wright asked for the plaintiff's telephone number and immediately after hanging up with Collins he dialed plaintiff's number. The defendant and Officer Brian Cook allege that during that phone call plaintiff first inquired if Wright was on a cellular telephone to which Wright answered in the negative. The plaintiff then proceeded to tell Wright that Wright was being watched by the police, that he needed to be careful when using the phone, that he needed to dispose of his "stash" and that he should "lay low." Plaintiff disputes this assertion and alleges that the two men only conversed about Wright's ex-girlfriend. There is no recording of this conversation. A few minutes after hanging up, Wright placed a call to Southwest Airlines.

Defendant contacted Assistant District Attorney Bob Sanders to determine if there was sufficient probable cause to arrest Wright and plaintiff based on the intercepted phone call. Sanders advised defendant that there was, and Officer Cook applied for and was issued an arrest warrant for plaintiff. Plaintiff was subsequently arrested that day by Officer Cook. Wright was charged and later convicted of possession of cocaine with intent to resale. Plaintiff was indicted for conspiracy to sell and/or deliver cocaine and accessory after the fact of the sale and delivery of cocaine. However, the evidence obtained through the intercepted phone call of plaintiff and Wright was later suppressed by Judge Hamilton because he found that, although the officers accurately followed the procedures set forth in Tenn.Code Ann § 39-13-604(f) for intercepting and recording cordless telephone communications, the procedures under the Federal Wiretap Act were not followed. Because he held that the

federal law preempted Tenn. Code Ann § 39-13-604, he suppressed the evidence from the phone call. Despite the dismissal of the charges, plaintiff was subsequently fired from his job as a police officer as a result of the incident.

II.

Title III of the Omnibus Crime Control and Safe Streets Act. referred to herein as the Federal Wiretap Act, sets forth standards and procedures for the use of electronic surveillance, as well as criminal and civil penalties for the violation of the Act. Specifically, section 2511 of the Federal Wiretap Law subjects to criminal sanctions or suit by the government any person who "willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication ...." 18 U.S.C. § 2511(1)(a). Section 2518 sets forth the procedures to be followed to apply for an intercept order. Section 2520(a) provides that "any person whose wire, oral or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." That same section of the statute also provides a "good faith" defense. Section 2520(d) specifically provides that "(1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization ... is a complete defense against any civil or criminal action brought under this chapter or any other law." 18 U.S.C. § 2520(d). It is clear that defendant's surveillance and interception of plaintiff's cordless phone violated the federal statute because the procedures set forth in Section 2518 (requiring a showing that less intrusive alternatives to wiretapping were tried before wiretapping) were not followed, but we find that the "good faith" defense in Section 2520 applies to excuse defendant from liability.

Three sets of laws covering interception of communications come into play in this case: The Federal Wiretap Law. 18 U.S.C. §§ 2510-2522: The Wiretapping and Electronic Surveillance Act of 1994. Tenn. Code Ann. §§ 40-6-30, et seq., known as the Tennessee Wiretap Law, and the Tennessee law covering the interception of cordless and cellular telephones. Tenn. Code Ann. § 39-13-604 ("Cordless and cellular phone transmissions; recording or dissemination"). The Tennessee Wiretap Law. Tenn. Code Ann. 40-6-30. et seq., parallels the Federal Wiretap Law in prohibiting the unauthorized interception and disclosure of oral communications and in requiring certain procedures to obtain an order. However, the federal law was amended in 1994 to include cordless phones, but the Tennessee law has not been similarly amended. Therefore, the Tennessee Wiretap Law in effect at the time of the interception here, and still in effect today, does not cover cordless phones. Tenn. Code Ann. § 40-6-303(19) (definition of "wire communication" specifically excludes cordless telephone communications). Instead, a separate statute. Tenn. Code Ann § 39-13-604, covers interceptions of cordless phones. Section 39-13-604(f), under which defendant proceeded, does not require that the person seeking the wiretap. generally law enforcement personnel to give the same information to the court as that required by the federal and state wiretap laws and is therefore generally easier to obtain. While this section is now arguably preempted by the federal statute covering cordless phones, it has not been held by a federal court or the Tennessee Supreme Court to be preempted by the Federal Wiretap Law.

Against the backdrop of this somewhat confusing array of applicable laws, we turn to the facts of this case. Before undertaking the surveillance of Wright's phone, defendant obtained a valid court order from a state court judge, in

accordance with Tenn Code Ann. § 39-13-604(f). the Tennessee law covering cordless phones By obtaining an ostensibly valid court order and relying on a state statute still in effect, defendant falls within two of the recognized authorizations under Section 2520 that provide a good faith defense to liability under the federal statute: ''a court warrant or order" and "a statutory authorization." 18 U.S.C. § 2520(d)(1). In addition to receiving a valid court order, defendant also went to the local district attorney, who also agreed that the court order and resulting surveillance were proper.

In arguing that the good faith defense does not apply, plaintiff does not contend that the court order is invalid or that the statute on which defendant relied, Tenn. Code Ann. § 39-3-604, is no longer good law. Instead, plaintiff argues that the good faith defense cannot apply here because defendant knew of the existence of the federal law and its coverage of cordless phones, but sought to avoid the restrictions in the federal law by looking solely to the state law. Defendant testified that although he knew of the existence of the federal law. he believed it did not apply to the type of cordless phone he wanted to tap and that he was correct in following the state statute instead of the federal statute. Plaintiff has not offered any evidence to refute this testimony except for his own belief about defendant's motives: nor has he offered any other credible evidence that defendant willfully ignored the federal law.

Because the evidence demonstrates that defendant held an honest and reasonable belief that he acted legally pursuant to a valid court order issued in accordance with state law. we hold that the good faith defense in Section 2520(d)(1) applies.

III.

It is less clear whether the interception of the cordless phone call also violated the Fourth Amendment, but we agree with the district court that defendant has qualified immunity from such a claim if there were a violation. We have used a three-part test to determine whether an official is entitled to qualified immunity. First, we must determine whether "[t]aken in the light most favorable to the party asserting the injury ... the facts alleged show the officer's conduct violated a constitutional right[.]" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). (citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991)) ; *Dickerson v. McClellan*, 101 F.3d 1151, 1157 (6th Cir. 1996). "[I]f a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." *Saucier*, 533 U.S. at 201; *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987). The third step is to determine whether a reasonable officer, similarly situated, would understand that the challenged conduct violated that established right. *See Saucier,* 533 at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999)).

A decade ago, courts considered two factors important in denying Fourth Amendment protections to the users of cordless telephones. The first is that such telephones broadcast radio signals from the receiver in all directions, thereby making conversations open to the public. The second is that the Federal Communications Commission has ordered that cordless telephone base units bear the legend "privacy of communications may not be ensured when using this phone." as did the phone used by Wright to call plaintiff. With such a

warning, a court may well reason that no one using the phone can reasonably expect privacy.

The situation has changed, however, since the first cordless phones were in use and conversations on modern cordless phones are not as readily intercepted. Newer cordless phones "monitor all available frequencies and automatically select one that is unused." "broadcast on radio frequencies not utilized by commercial radio," and "actually scramble the radio signal." *United States v. Smith*, 978 F.2d 171, 179 (5th Cir.1992). The court in *Smith,* after taking note of these changes, concluded that because of the wide variety of cordless phones in use there exists no "general rule that it either is or is not reasonable to expect privacy for cordless telephone conversations." *Id.* ("the reasonableness of any expectation of privacy for a cordless phone will depend, in large part, upon the specific telephone at issue."). This was the situation at the time of the intercept of Wright's phone in 2001. Therefore, in the Fourth Amendment criminal search and seizure context, interception of a message conveyed using a cordless phone may or may not have been made with a reasonable expectation of privacy; depending upon the nature of the cordless telephone technology used.

Because we have not been presented with enough facts in this case to decide this novel issue concerning privacy expectations in cordless phones, we can only conclude that plaintiff has attempted to allege a constitutional violation. We are unable to conclude, as a matter of law, that the interception of a cordless telephone, in the circumstances alleged, violated the Fourth Amendment. We find no cases that would, in such novel situations, require us to answer conclusively the constitutional question as a matter of law before proceeding to steps two and three.

The answer is clear, however, when we turn to the questions of whether the alleged constitutional violation was "clearly established" at the time it occurred and whether a reasonable person in defendant's position would have known that his actions violated clearly established rights. *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) ("the right the official is *alleged to have violated* must have been 'clearly established' in a ... particularized sense" and must be "sufficiently clear that a reasonable official would understand that what he is doing violated that right.") (emphasis added); *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). The right to privacy in using a cordless phone is not "clearly established." As explained above, prior to the amendment to the Federal Wiretap Law in 1994 to cover cordless phones, courts uniformly held that cordless telephone users did not have a reasonable expectation of privacy in their phone conversations under the Fourth Amendment. *See, e.g. McKamey v. Roach,* 55 F.3d 1236 (6th Cir. 1995) (collecting cases). To date neither the Supreme Court nor the Sixth Circuit has specifically addressed whether a reasonable expectation of privacy exists under the Fourth Amendment for cordless telephone communications. We therefore agree with the district court that the law is not "clearly established" that users of cordless phones have a reasonable expectation of privacy under the Fourth Amendment.

Furthermore, a reasonable person in defendant's position would not know that his actions violated the Fourth Amendment for the same reasons set forth above to establish the good faith defense to liability under the federal statute. Defendant obtained an ostensibly valid court order in reliance on Tennessee law by a Tennessee judge and received verification of its propriety from the local district attorney. We therefore agree with the district court that defendant has

qualified immunity from liability for a Fourth Amendment violation.

For the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE,
COLUMBIA DIVISION

No. 1-01-0119

[Decided October 10, 2002]

VERNON D. FRIERSON)
)
v.)
)
TOMMY GOETZ)
)

Thomas A. Higgins, United States District Judge

MEMORANDUM

The Court has before it the defendant's motion (filed July 19, 2002; Docket Entry No. 15) and memorandum (Docket Entry NO. 16) in support and the plaintiff's response (filed August 12, 2002; Docket Entry No. 25) and memorandum (Docket Entry No. 26) in opposition.

The Court has subject matter jurisdiction over the plaintiff's claims under Title 18, United States Code, Section 2510 *et seq.*, and Title 42, United States Code, Section 1983, pursuant to 28 U.S.C. §§ 1331 and 1343 and supplemental

jurisdiction over the plaintiff's state law claims pursuant to 28 U.S.C. § 1367.

For the reasons set forth below, the Court shall grant the defendant's motion.

I.

The plaintiff, Vernon D. Frierson, a resident of Maury County, Tennessee, filed this action on November 7, 2001, against the defendant, Tommy Goetz, who was an investigative officer employed by the City of Mt. Pleasant, Tennessee, and assigned to the Maury County Drug Task Force, in his individual capacity. The plaintiff alleges that the defendant violated his Fourth Amendment right to be secure in his person against unreasonable searches by violating Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510-2522 ("the Federal Wiretap Act"). Specifically, he alleges that the defendant unlawfully intercepted communications he made while talking on a cordless telephone. As a result, the plaintiff was arrested and was fired from his job as a police officer for the City of Lewisburg, Tennessee. The plaintiff also asserts state law claims of false light and invasion of privacy.[1]

On or about September 20, 2000, the Maury County Drug Task Force began investigating a man named Michael Wright for drug distribution being conducted at his place of business, T and M Beauty Supply, located on North Main Street in

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[1] The plaintiff also asserted a claim of malicious prosecution. However, in his memorandum the plaintiff conceded that summary judgment should be granted as to this claim.

Columbia, Tennessee. His business was placed under twenty-four hour surveillance. During that surveillance, Mr. Wright was observed using a cordless telephone. On November 8, 2000, the defendant placed a scanner in his vehicle to intercept communications conducted over the cordless telephone. In a separate vehicle, the defendant placed another scanner and a recorder attached to it to record those communications intercepted by the scanner.[2]

While monitoring the scanner, the defendant overheard communications between Mr. Wright and a person unknown pertaining to a possible drug transaction. Based upon this information, the defendant appeared before the Honorable Jim T. Hamilton, Circuit Court Judge for Maury County, Tennessee, to obtain an order "authorizing the preservation, retention and continued recording of protected communications pursuant to Tenn. Code Ann. § 39-13-604." *See* affidavit (filed July 19, 2002; Docket Entry No. 18), attachment thereto, Exhibit 1. The application was granted. The defendant subsequently showed Assistant District Attorney Brent Cooper the application and order and was advised by him that he had followed the applicable procedures set forth in Tenn. Code Ann. § 39-13-604 to record cordless telephone transmissions at T and M Beauty Supply.

On November 9, 2000, Officer Mike Johnson of the Maury County Drug Task Force telephoned the plaintiff to inquire about Michael Wright. The officer was interested in the location of the T and M Beauty Supply in Lewisburg and

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[2] The defendant's vehicle was located on the third floor of a garage building that was across from T and M Beauty Supply. The second vehicle with the other scanner and recorder was located on the second floor of the garage.

where Mr. Wright was residing in Mt. Pleasant. The plaintiff, who was from Mt. Pleasant and sat on the city council there, was familiar with many of the residents of Mt. Pleasant. He also was a police officer with the Lewisburg City Police Department. The defendant and Officer Johnson believed that the plaintiff might naturally be able to provide them information as to these two questions. During this conversation, the defendant asserts that the plaintiff was informed that the questions were with regard to an ongoing investigation of Mr. Wright. The plaintiff, however, disputes this and contends that he did not receive any indication that Mr. Wright was under investigation.

On November 10, 2000, a conversation between Bennie Collins and Mr. Wright was intercepted by the Drug Task Force. Mr. Collins was heard telling Mr. Wright that the plaintiff wanted to talk to him. Mr. Wright asked for the plaintiff's telephone number and immediately after hanging up with Mr. Collins, dialed the plaintiff's number. The defendant and Officer Brian Cook allege that the plaintiff first inquired if Mr. Wright was on a cellular telephone to which he answered in the negative. The plaintiff then proceeded to tell Mr. Wright that he was being watched by the police, that he needed to be careful of what he talked on, that he needed to dispose of his "stash" and that he should "lay low." The plaintiff disputes this assertion and alleges that the two men only conversed about Mr. Wright's ex-girlfriend.[3] The conversation lasted only 48 seconds. Eight and one-half minutes later, Mr. Wright placed a call to Southwest Airlines.

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[3] There is no recording of this conversation. According to the defendant, the recorder only picked up feedback.

The defendant contacted Assistant District Attorney Bob Sanders to determine if there was sufficient probable cause to arrest Mr. Wright and the plaintiff. General Sanders advised the defendant and Officer Cook that there was sufficient probable cause to arrest both men. Officer Cook applied for and was issued an arrest warrant for the plaintiff. The plaintiff was subsequently arrested that day by Officer Cook. Mr. Wright was charged and later convicted of possession of cocaine with intent to resale. The plaintiff was indicted for conspiracy to sell and/ or deliver cocaine and accessory after the fact of the sale and/ or delivery of cocaine. However, the evidence obtained through the recording of the plaintiff was later suppressed by Judge Hamilton.

In his order, Judge Hamilton found that the officers accurately followed the procedures set forth in Tenn. Code Ann. § 39-13-604 for recording cordless telephone communications. Defendant's response (filed August 23, 2002; Docket Entry No. 33) to plaintiff's statement of undisputed facts, attachment thereto, order entered by Judge Hamilton. However, he found that the Federal Wiretap Act preempted Tenn. Code Ann. § 39-13-604 in accordance with the Supremacy Clause of the United States Constitution. He stated:

> Because Tenn. Code Ann. § 39-13-604 lowers the requirements for the seizure of communications made by cordless and cellular telephones, by not requiring that an application, the content of which is based on the Fourth Amendment principles, for an order, authorizing electronic surveillance be submitted, the Federal Wiretapping law preempts Tenn. Code Ann. § 39-13-604.

Id.

The plaintiff contends that by violating the Federal Wiretap Act, the defendant violated his right to be free from unreasonable searches. As a result, the plaintiff was arrested and subsequently fired from his job as a police officer. He further suffered degradation and ridicule. In addition to his Fourth Amendment claim, the plaintiff asserts that he has suffered mental anguish, humiliation and embarrassment, damage to his character and reputation, loss of privacy and loss of wages.

The defendant contends that he is entitled to the good faith defense provided under the Federal Wiretap Act. He also contends that he is qualified immune from the plaintiff's constitutional and Federal Wiretap claims. The defendant further contends that he is entitled to a judgment as a matter of law because he did not know nor had reason to know that the use of the recordings was a violation of the law. With regard to the state law claims, the defendant contends that any statements made by him concerning the content of the recordings were absolutely privileged.

II.

As provided by Federal Rule of Civil Procedure 56(c), summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S. Ct. 2505, 2509-10, 91 L. Ed. 2d 202, 211 (1986). In its consideration of the evidence, the Court must view all facts and inferences to be drawn therefrom in the light most favorable to the non-moving party. *Davidson & Jones Dev. Co. v. Elmore Dev. Co.*, 921 F.2d 1343, 1349 (6th Cir.

1991). In order to prevail on a summary judgment motion, the moving party bears the burden of proving the absence of a genuine issue of material fact concerning an essential element of the opposing party's action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265, 274 (1986); *Davidson & Jones Dev. Co.*, 921 F.2d at 1349; *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989). An issue of material fact is one which, under the substantive law governing the issue, might affect the outcome of the suit. *Liberty Lobby*, 477 U.S. at 248, 106 S. Ct. at 2510, 91 L. Ed. 2d at 211.

In addition, a dispute about the material fact must be genuine, that is, "the evidence is such that a reasonable jury could return a verdict for the non-moving party."[4] *Id.* at 248, 106 S. Ct. at 2510, 91 L. Ed. 2d at 211-12. Since the preponderance of the evidence standard is used in this determination, more than a mere scintilla of evidence in support of the plaintiff's position is required. *Id.* at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

Once a motion for summary judgment has been made, "the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e)." *Davidson & Jones Dev. Co.*, 921 F.2d at 1349. The non-moving party may not merely rest on conclusory allegations contained in the complaint, but must respond with affirmative evidence supporting its claims and establishing the existence

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[4] The Supreme Court of the United States further explained that a court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Lobby*, 477 U.S. at 251-52, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

of a genuine issue of material fact. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553, 91 L. Ed. 2d at 274; *Cloverdale Equip. Co. v. Simon Aerials, Inc.*, 869 F.2d 934, 937 (6th Cir. 1989). While the disputed issue does not have to be resolved conclusively in favor of the non-moving party to defeat summary judgment, "sufficient evidence supporting the claimed factual dispute" must be shown, thereby requiring resolution of the parties' differing versions of the truth by a jury or judge. *Liberty Lobby*, 477 U.S. at 249, 106 S. Ct. at 2510, 91 L. Ed. 2d at 212; *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289, 88 S. Ct. 1575, 1592, 20 L. Ed. 2d 569, 592 (1968).

III.

The plaintiff contends that his communications were unlawfully intercepted in violation of the Fourth Amendment and the Federal Wiretap Act. The plaintiff asserts that the defendant did not properly apply for an order authorizing or approving the interception of an oral communication pursuant to 18 U.S.C. § 2518. In response, the defendant contends that he reasonably and in good faith relied on a valid court order authorizing the preservation, retention and continued recording of protected communications and on statutory authorization under the Tenn. Code Ann. § 39-13-604. As a result, he asserts the good faith defense under the Federal Wiretap Act and the defense of qualified immunity. The Court finds that the defendant is entitled to qualified immunity for the plaintiff's claims under the Fourth Amendment and the Federal Wiretap Act.

The purpose of the Federal Wiretap Act was to forbid electronic surveillance and interception of those communications which qualified as wire, oral or electronic communications, as defined by that statute. *Blake v. Wright,*

179 F.3d 1003, 1011 (6th Cir. 1999). The Act provides that "any person who intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication" is subject to criminal sanctions and civil suit. 18 U.S.C. §§ 2511(1)(a), 2520(a).[5] The Act also provides criminal and civil liability for anyone who intentionally discloses or uses the contents of an illegally intercepted communication, knowing or having reason to know that information was illegally obtained. 18 U.S.C. § 2511(1)(c), (d). However, the Act explicitly provides a good faith exception as a complete defense against any civil or criminal action brought under the statute if the person had a good faith reliance on (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization; (2) a request of an investigative or law enforcement officer; or (3) if the person falls under the exceptions pertaining to persons or entities that provide an electronic communication service to the public. 18 U.S.C. § 2520(d)(1)-(3).

The Wiretapping and Electronic Surveillance Act of 1994, codified as Tennessee Code Ann. § 40-6-301 *et seq.*, parallels the Federal Wiretap Act and similarly prohibits the unauthorized interception and disclosure of oral communications. However, the Federal Wiretap Act was amended in 1994 and, unlike Tenn. Code Ann. § 40-6-301 *et seq.*, now applies to cordless telephones. *McKamey v. Roach,*

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[5] Section 2520(a) provides that "any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate."

55 F.3d 1236, 1238 n.1 (6th Cir. 1995). Originally, cordless telephone communications were excepted from the Federal Wiretap Act. In defining "wire" and "electronic" communication, the pre-1994 federal law explicitly excluded cordless telephones. These exceptions were removed by Congress in 1994. *Id.*

Tennessee Code Ann. § 40-6-301 *et seq.* was adopted in 1994 and, although amended in 1996, excepts cordless telephones from the definition of "electronic communication." Section 40-6-303(7) defines "electronic communication" as:

> any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by the aid of wire, radio, electromagnetic, photooptical, or photoelectronic facilities, but does not include:
>
> > (A) The radio portion of a cordless telephone communication that is transmitted between the cordless telephone handset and the base unit;
> > (B) Any wire or oral communication ...

Tenn. Code Ann. § 40-6-303(7). Similarly, Section 40-6-303(19) defines "wire communication" as:

> any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception ... [but] does not include the radio portion of a cordless telephone communication that is

> transmitted between the cordless telephone handset and the base unit.

Tenn. Code Ann. § 40-6-303(19).[6]

Like the Federal Wiretap Act codified at 18 U.S.C. § 2518, § 40-6-304 of the Tennessee Code sets forth the procedures for applying for an order authorizing the interception of wire, oral or electronic communications. In his amended complaint (filed Nov. 19, 2001; Docket Entry No. 3), ¶ 3.9, the plaintiff alleges that the defendant did not comply with the procedures as set forth in 18 U.S.C. § 2518 in applying for such an order. In particular, the plaintiff contends that the defendant did not state that other investigative procedures were tried and failed or why such procedures were unlikely to succeed if tried or that they would be too dangerous if tried. *See* 18 U.S.C. § 2518(1)(c).[7] Instead, the defendant relied on Tenn. Code Ann. § 39-13-

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[6] Tennessee Code Ann. § 40-6-303(7) and (19) is almost identical to the wording used in the Federal Wiretap Act prior to the 1994 amendments.

[7] Tennessee Code § 40-6-304 requires the same information as 18 U.S.C. § 2518 when applying for an order authorizing the interception of wire, oral or electronic communications. The application shall include the following: (1) the identity of the investigative officer; (2) a full statement of the facts and circumstances relied upon as justification for the order; (3) whether other investigative techniques have been tried and, if not, then why; (4) a statement of the period of time for which the interception is required to be maintained; and (5) a statement of facts concerning previous applications made with regard to the authorization of interceptions of wire, oral or electronic communications. *See* 18 U.S.C. § 2518 and Tenn. Code Ann. § 40-6-304.

604, which separately addresses the interception of cordless telephone communications.

Section 39-13-604(f)(1) provides that a law enforcement officer may record a protected communication where the preservation and the retention of the recording is pertinent to a criminal investigation. The officer must provide the name of the officer making the recording and the time and date the recording was made. *Id.*, § 39-13-604(f)(2). Within 48 hours of making the recording, the officer must make an application to a judge for an order authorizing the continued recording and preservation and retention of recordings already made. Id., § 39-13-604(f)(3). The officer must also certify to the judge that the recording is pertinent to the investigation, the nature of the offense and the address of the location of the cordless communication intercepted. *Id.*, § 39-13-604(f)(4).

The defendant complied with the procedures set forth in § 39-13-604 in making his application before Judge Hamilton, and an order authorizing the interception and preservation and retention of such recording was issued. The defendant argues that he relied on Tenn. Code Ann. § 39-13-604, which qualifies as "statutory authorization" under 18 U.S.C. § 2520(d)(1). He also asserts that he relied on the court order entered by Judge Hamilton, which also qualifies under the good faith defense provided under 18 U.S.C. § 2520(d)(1). He further argues that he relied on the advice of General Cooper regarding the application and order authorizing such an interception. Thus, the defendant contends that a reasonable officer acting in "good faith" would believe that he could implement the interception and recording of cordless telephone conversations pursuant to the statutory exception provided in Tenn. Code Ann. § 39-13-604 and pursuant to the November 8, 2000, court order. The defendant further argues that he is entitled to qualified immunity.

Qualified immunity is an immunity from suit that extends to government officials performing discretionary functions. *Blake*, 179 F.3d at 1007. Government officials acting in their official capacities are not liable for civil damages if their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396, 410 (1982); *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523, 530 (1987) ("[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, assessed in light of the legal rules that were 'clearly established' at the time it was taken."). "The statutory or constitutional rights in question must have been 'so clearly established when the acts were committed that any officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct.'" *Cullinan v. Abramson*, 128 F.3d 301, 309 (6th Cir. 1997) (citations omitted). "This 'objective reasonableness' standard focuses on whether defendants reasonably could have thought that their actions were consistent with the rights that plaintiff claims have been violated." *Walton v. City of Southfield*, 995 F.2d 1331, 1336 (6th Cir. 1993).

In determining whether qualified immunity applies, courts are to apply a two-part inquiry. First, courts must decide whether the alleged constitutional or statutory violations were "clearly established" at the time of the alleged violations. *Blake*, 179 F.3d at 1007. A right is "clearly established" if the question has been decided by the Supreme Court, the United States Court of Appeals for the circuit in which the district court deciding the issue sits, the district court itself or

case law from other circuits that is directly on point. *Id.* However, "a single recent case from the Court of Appeals of another circuit is hardly sufficient to make the law 'clearly established' in [the Sixth Circuit]." *Eugene D. v. Karman*, 889 F.2d 701, 706 (6th Cir. 1989); *Cullinan*, 128 F.3d at 311 ("Ordinarily, at least, in determining whether a right is 'clearly established' this court will not look beyond Supreme Court and Sixth Circuit precedent."). Courts may also look to the highest state court in the state where the case arose. *Id.*, at 706 n.6. "Although the absence of a case on point does not necessarily endow a public official with public immunity, 'when this court can uncover only some generally applicable principle, its specific application to the relevant controversy must again have been clearly foreshadowed by applicable direct authority.'" *Blake*, 179 F.3d at 1007 (internal quotations omitted). Further,

> [t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson, 483 U.S. at 640, 107 S. Ct. at 3039, 97 L. Ed. 2d at 531.

Once a court finds that the right is clearly established, the court must next decide "whether a reasonable person in the defendant's position would have known that his or her actions

violated clearly established rights." *Blake*, 179 F.3d at 1008.[8] The test is an objective standard, and the defendant's subjective intent is irrelevant. *Id.*

With regard to the plaintiff's Fourth Amendment claim, the Court must determine whether the plaintiff had a reasonable expectation of privacy while using a cordless telephone. The Supreme Court has found that a fundamental right to privacy exists in wire communications under the Fourth Amendment. *Berger v. New York*, 388 U.S. 41, 87 S. Ct. 1873, 18 L. Ed. 2d 1040 (1967). In *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 512, 19 L. Ed. 2d 576, 583 (1967), the Supreme Court held that government agents violate the Fourth Amendment by recording private communications without a warrant or court order when a person has a reasonable expectation of privacy. A reasonable expectation of privacy exists if a person has an expectation of privacy that is reasonable under the circumstances. *Id.* (The government violates the Fourth Amendment "when electronically listening to and recording the [person's] words violate[] the privacy upon which he justifiably relied ....."). Thus, the test has both a subjective and an objective component. This two part standard was summarized in Justice Harlan's concurring opinion wherein he articulated:

> As the Court's opinion states, "the Fourth Amendment protects people, not places." The question, however, is what protection it affords to those people.

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[8] The Court notes that if the right is determined to be "clearly established" and barring the pleading of extraordinary circumstances, the defense of qualified immunity will usually fail because "a reasonably competent public official should know the law governing his conduct." *Id.* n.4 (citation omitted).

> Generally, as here, the answer to that question requires reference to a "place." My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the "plain view" of outsiders are not "protected" because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

389 U.S. at 361, 88 S. Ct. at 516, 19 L. Ed. 2d at 587-88 (Harlan, J., concurring).

The Federal Wiretap Act was first enacted in 1968 and did not apply to the monitoring of radio communications. *Bartnicki v. Vopper*, 532 U.S. 514, 524, 121 S. Ct. 1753, 1759, 149 L. Ed. 2d 787, 799 (2001). It was later amended in 1986 to prohibit the interception of "electronic" as well as oral and wire communications. *Id.* The Act was amended again in 1994 and now extends to the interception of conversations over both cordless and cellular telephones. *Id.* Prior to the 1994 amendment, courts uniformly held that a cordless telephone user did not have a reasonable expectation of privacy in his cordless telephone conversations under either the Federal Wiretap Act or the Fourth Amendment. *McKamey*, 55 F.3d at 1239 (collecting cases). The United States Court of Appeals for the Sixth Circuit explained that this was because cordless telephone communications are transmitted via radio waves "to all who wish to overhear" and

noted Congress' observation in the 1986 amendments to the Act that radio waves are easily intercepted. *Id.* at 1239-40.

The application of the Fourth Amendment to cordless telephone communications was thoroughly addressed by the United States Court of Appeals for the Fifth Circuit in *United States v. Smith*, 978 F.2d 171 (5th Cir. 1992). In determining that the pre-1994 version of the Federal Wiretap Act did not apply to cordless telephone communications, the Court then attempted to determine whether the Fourth Amendment provided protection to the user of a cordless telephone. The Court recognized the difficulty in characterizing cordless telephones as either like traditional land-based telephones or like radio transmitters. *Id.* at 177. It noted that the former was clearly protected by the Fourth Amendment but that pure radio communications were not afforded such protection because "'[b]roadcasting communications into the air by radio waves is more analogous to carrying on an oral communication in a loud voice or with a megaphone than it is to the privacy afforded by a wire.'" *Id.* (citations omitted).

According to the Court, the problem was that cordless telephones did not fit neatly into either category. *Id.* at 178. However, although cordless telephones were not easily characterized, it did not mean that a communication was not entitled to Fourth Amendment protection simply because it was not transmitted over a wire. *Id.* at 179. The Court explained that the significant difference between cordless telephone communications and wire communications was that conversations over early versions of cordless telephones were very easily intercepted and therefore a user could never have a reasonable expectation of privacy. *Id.*; *Price v. Turner*, 260 F.3d 1144, 1148 (9th Cir. 2001). The Court noted, however, that with the evolution of cordless technology the

reasonableness of an expectation of privacy increased as technological advances made it more difficult for cordless communications to be intercepted. *Id.* Some of these advances included limiting the effective range of the cordless telephones to a range of about sixty feet; no longer "pre-setting" cordless telephones to one frequency, enabling them to monitor and select a frequency not being used; broadcasting on radio frequencies not used by commercial radio, which prevents conventional radios from picking up cordless telephone communications; and cordless telephones being able to scramble the radio signal to prevent radio scanners from intercepting such communications. *Id.* The Court stated:

> Courts should bear in mind that the issue is not whether it is *conceivable* that someone could eavesdrop on a conversation but whether it is *reasonable* to expect privacy. No matter how technologically advanced cordless communication becomes, some people will always find a way to eavesdrop on their neighbors. However, "[t]he fact that [Listening] Toms abound does not license the government to follow suit." Although we express no opinion as to what features or circumstances would be necessary to give rise to a reasonable expectation of privacy, it should be obvious that as technological advances make cordless communications more private at some point such communication will be entitled to Fourth Amendment protection. Given this conclusion, it should be equally obvious that it is not enough for a trial court to conclude that interception of a conversation does not implicate Fourth Amendment concerns simply because it is carried by a "cordless" phone. Application of the Fourth Amendment in a given case will depend largely upon the specific technology used ....

Id., 978 F.2d at 179-80 (emphasis in original) (citations and footnote omitted). The Court concluded:

> [I]n spite of the fact that a defendant uses a cordless phone, the circumstances may show that he also has a reasonable expectation of privacy .... [A] trial court must do more than simply conclude that a defendant had no expectation of privacy because he used a cordless phone; instead, the trial court must be prepared to consider the reasonableness of the privacy expectation in light of all the particular circumstances and the particular phone at issue.

Id. at 180.

At the state preliminary hearing, the defendant testified that his scanner will not pick up digital or scrambled or encoded cordless telephones. Transcript (filed August 12, 2002; Docket Entry No. 31) of preliminary hearing at 18. It only picks up conversations from analog cordless telephones. *Id.* He further testified that the telephones seized from Mr. Wright's premises bore inscriptions on the back indicating that the persons using such telephones did not have an expectation of privacy. *Id.* at 19.[9] Moreover, both the defendant and Officer Cook attested in their affidavits that the plaintiff was apprehensive enough to inquire of Mr. Wright if he was talking on a cellular telephone, the implication ostensibly being that the plaintiff was aware that such a

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[9] The Federal Communications Commission regulations currently require the label on cordless telephones to contain the following statement: "Privacy of communications may not be ensured when using this phone." 47 C.F.R. § 15.214.

communication could be intercepted. Affidavits of Tommy Goetz (Docket Entry No. 18), ¶ 19 and Officer Brian Cook (filed July 19, 2002; Docket Entry No. 19), ¶ 10.

Neither the Supreme Court nor the Sixth Circuit has specifically addressed whether a reasonable expectation of privacy exists under the Fourth Amendment for cordless telephone communications. The Court therefore finds that the law is not "clearly established" that a user of an analog cordless telephone has a reasonable expectation of privacy under the Fourth Amendment.

Moreover, even if all cordless telephones are treated the same, the Court finds that the case law, examined in conjunction with the relevant Tennessee statutes, does not clearly establish that the defendant's actions were unlawful. The defendant argues that a reasonable officer acting in good faith would believe that he could intercept cordless telephone communications pursuant to Tenn. Code Ann. § 39-13-604 and the court order issued by Judge Hamilton. As a result, he contends that the law was not clearly established that his actions were unlawful. The Court agrees.

In *Blake, supra,* the chief of police had a recording device placed on all non-emergency telephone lines of the police station to record all incoming and outgoing telephone calls of the police department's employees, pursuant to an Ohio statute. 179 F.3d at 1006. The employees filed suit for violations of the Fourth Amendment and the Federal Wiretap Act. The chief of police asserted qualified immunity as a defense to both claims. *Id.* The Sixth Circuit held that the defendant was entitled to qualified immunity with regard to the Fourth Amendment claim because "the law regarding the administrative monitoring of police telephone lines was sufficiently unclear at the time of the alleged violations that a

'reasonable' officer in [the defendant's] position would not have known he was violating clearly established law." *Id.* at 1010-11. The Court reasoned that at the time the recording device was installed there were no state or federal cases that provided guidance to city officials as to the constitutionality of the Ohio statute. *Id.* at 1010. The Court noted that the plaintiffs did not cite and the Court could not find one case that, at the time of the allegations, pertained to the interpretation of the statute with regard to the administrative monitoring of police telephone lines. *Id.*

Likewise, this Court cannot find any relevant federal or state law to provide guidance in interpreting Tenn. Code Ann. § 39-13-604 with respect to the plaintiff's Fourth Amendment claim. In just a recent opinion by the Tennessee Supreme Court dealing with the Tennessee wiretapping law codified at Tenn. Code Ann. § 40-6-301 *et seq.*, the court recognized that it had not addressed the provisions of the Tennessee wiretap law. *State v. Munn*, 56 S.W.3d 486, 497 (Tenn. 2001). It went on to state that it adopted the same standard employed by the Fourth Amendment in determining the extent of protection under the Tennessee wiretap laws, that is, "(1) whether the individual had an actual, subjective expectation of privacy, and (2) whether society is willing to view the individual's subjective expectation of privacy as reasonable and justifiable under the circumstances." *Id.*

The highest court in Tennessee to specifically address warrantless interceptions of cordless telephone conversations implicating Tenn. Code Ann. § 39-13-604(f) is the criminal court of appeals in *State v. Pendergrass*, 1995 Tenn. Crim. App. LEXIS 188, No. 01 C01-9306-CR-00169, 1995 WL 108248, at *1 (Tenn. Crim. App. 1995), *rev'd on procedural grounds*, 937 S.W.2d 834 (Tenn. 1996). In that case, the court gave a thorough analysis of a user's expectation of

privacy in using cordless telephones prior to the 1994 amended Federal Wiretap Act, addressing both federal and state authorities. In addressing the passage of Tenn. Code Ann. § 39-13-604 in 1994, the court stated:

> [A]lthough the legislature declared a public policy that, absent court order at a specified point, cordless telephone conversations are not to be recorded and such recordings are not to be disseminated, it likewise gave official recognition to the fact that the radio broadcast characteristics of a cordless telephone, as a practical matter, make it a means of communication greatly lacking in privacy.

Id. at *14. On remand after being reversed on procedural grounds, the criminal court of appeals affirmed its earlier ruling on the substantive issues, stating, "Since our 1995 opinion, neither this court nor the Tennessee Supreme Court has had occasion to consider the constitutional ramifications of warrantless electronic surveillance of cordless telephone conversations. The United States Supreme Court has been silent on this issue, as well." *State v. Pendergrass*, 1998 Tenn. Crim. App. LEXIS 1250, No. 01 C01-9708-CR-00359, 1998 WL 846588, at *1 (Tenn. Crim. App. 1998).

In light of the fact that the law remains unclear as to the legality of Tenn. Code Ann. § 39-13-604, the defendant complied with the procedures set forth in that statute and was issued a court order authorizing the retention and continuation of such recordings, the Court finds that the a "reasonable" officer in the defendant's position would not have known that he was violating clearly established law. *Blake*, 179 F.3d at 1010-11. Accordingly, the Court finds that the defendant is entitled to qualified immunity.

With regard to the plaintiff's claim under the Federal Wiretap Act, the Act provides a good faith exception to a criminal or civil action brought pursuant to the statute if the defendant relied on a court order or statutory authorization. 18 U.S.C. § 2520(d)(1). The defendant asserts that like the plaintiff's Fourth Amendment claim he is also entitled to qualified immunity for the plaintiff's claim under the Federal Wiretap Act because he relied on Tenn. Code Ann. § 39-13-604 authorizing the interception of cordless telephone communications as well as the court order entered by Judge Hamilton authorizing the continued recording of such communications. The Court agrees. *See Blake*, 179 F.3d at 1013 (finding that qualified immunity is applicable as a defense to a claim under the Federal Wiretap Act).

As stated previously, the absence of any law relating to the interception of cordless telephone communications, in general, and to Tenn. Code Ann. § 39-13-604, in particular, fails to clearly establish whether the defendant's actions violated clearly established law. *See*, *e.g.*, *id.* (referring to the administrative exception to the Ohio statute authorizing the monitoring of police telephone lines, the Court stated, "This court has not discovered case law that discusses the good faith defense of Title III with respect to a similar statutory provision .... Nor has Ohio or federal law fully explained the meaning of 'statutory authorization' under Title III.").[10]

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[10] The plaintiff cites *Spetalieri v. Kavanaugh*, 36 F. Supp. 2d 92 (N.D.N.Y. 1998) for the proposition that the law was well established in 2000 that the Federal Wiretap Act covered cordless telephone communications. The district court stated, "Whether the 1994 amendments to Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the "Amendments") apply to *all* cordless telephones appears to be an issue of first impression. The Court has not found, and the parties have not presented, any case applying the

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Amendments to cordless telephone conversations." *Id.* at 112 (emphasis in original). The court noted that the defendants in that case relied on a law review article supporting the contention that the amendments did not apply to all cordless telephones. In the article, the author stated:

> Will courts protect all cordless communications? Unfortunately neither the 1994 Act, nor its legislative history, provide a clear answer .... [T]he 1994 amendment merely removes the cordless telephone exclusion. The language that expressly extends protection to cordless phones is found in the legislative history of the 1994 Act. Nonetheless, even if courts turn to the legislative history of the Federal Wiretap Act, it may not find a clear congressional intent to protect all cordless phones. First, although the legislative history of the 1994 Act states that the protection of the ECPA is extended to cordless phones, it does not state that all cordless phones are protected.
>
> Secondly, the legislative history of the 1994 Act further states that Congress decided to extend ECPA protection after examining a wide array of communications, media, including "the newer generation of cordless phones" (phones not easily intercepted). If one reads this legislative history in conjunction with the legislative history of the ECPA, which specifically states that Congress did not extend Title III protection to cordless phones because they are so easily intercepted, it appears that there is no protection for conventional cordless telephones. Nevertheless, Congress' willingness to protect cordless phones appears to have come only after those phones were equipped with anti-interception devices.

Basil W. Mangano, *The Communications Assistance for Law Enforcement Act and Protection of Cordless Telephone Communications: The Use of Technology as a Guide to Privacy*, 44

Accordingly, the Court finds that the defendant is entitled to qualified immunity with respect to the plaintiff's claim under the Federal Wiretap Act.

The plaintiff argues that the defendant is not entitled to the qualified immunity defense because the law was clearly established that the Federal Wiretap Act preempted state law. Courts are reluctant to presume that Congress intended to preempt state law "'unless it conflicts with federal law or would frustrate the federal scheme, or unless the courts discern from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the States.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48, 105 S. Ct. 2380, 2393, 85 L. Ed. 2d 728, 745 (1985) (citations and internal quotes omitted); *Building and Constr. Trades Council of the Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 224, 113 S. Ct. 1190, 1194, 122 L. Ed. 2d 565, 574 (1993). Courts should first attempt to reconcile the application of both the federal and state laws before disqualifying the other. *Merrill*

Clev. St. L. Rev. 99, 119-20 (1996); *see also* Frank J. Eichenlaub, *Carnivore: Taking a Bite out of the Fourth Amendment?*, 80 N.C. L. Rev. 315, 339 (2001) (indicating that although the Federal Wiretap Act now includes cordless telephone communications, there is still some doubt as to whether there is a reasonable expectation of privacy in such communications). The district court, however, rejected the defendants' contention stating that, while supported by logic, it was contrary to the statutory language. *Spetalieri*, 36 F. Supp. 2d at 113.

While these authorities provide some interesting insight, they are not relevant for purposes of determining qualified immunity as to whether the law was clearly established in this circuit with respect to the defendant's conduct pursuant to Tenn. Code Ann. § 39-13-604.

Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 126, 94 S. Ct. 383, 389, 38 L. Ed. 2d 348, 358 (1973). Nor should courts seek out conflicts between federal and state regulations where none clearly exists. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130, 98 S. Ct. 2207, 2216, 57 L. Ed. 2d 91, 103 (1978). Thus, state law should only be displaced "'to the extent that it actually conflicts with federal law.'" *Dalton v. Little Rock Family Planning Servs.*, 516 U.S. 474, 476, 116 S. Ct. 1063, 1064, 134 L. Ed. 2d 115, 118 (1996).

As stated earlier, Judge Hamilton found that Tenn. Code Ann. § 39-13-604 was preempted by the Federal Wiretap Act. The United States Court of Appeals for the Second Circuit has held that whether proceedings are before a federal or state court,

> interpretation of a state wiretap statute can never be controlling where it might impose requirements less stringent than the controlling standard of Title III. If a state should set forth procedures more exacting than those of the federal statute, however, the validity of the interceptions and the orders of authorization by which they were made would have to comply with that test as well.

United States v. Marion, 535 F.2d 697, 702 (2d Cir. 1976) (footnote omitted); *but cf. Nix v. O'Malley*, 160 F.3d 343, 347 n.4 (6th Cir. 1998) (plaintiff brought action for the unlawful use and disclosure of intercepted communications under a 1995 version of an Ohio statute which only provided action for illegal "disclosures." The parties interpreted the Ohio statute as being in line with the Federal Wiretap Act which encompassed illegal "use" as well. The Sixth Circuit noted, "Believing that Title III may preempt some state laws,

the parties ... interpret Ohio's law as comparable to Title III .... Whatever the merit of this approach-and we take no position on it ...."). Assuming, without deciding, that the Federal Wiretap Act preempts Tenn. Code Ann. § 39-13-604, the Court finds that the defendant is still entitled to qualified immunity under the good faith exception provided in the Federal Wiretap Act. As stated above, taking into consideration the dearth of case law regarding the post-1994 Federal Wiretap Act with respect to the interception of cordless telephone communications and Tennessee state law regarding the Tennessee wiretap statutes and the defendant's reliance on statutory authorization and a court order, the Court finds that the case law was sufficiently unclear regarding the unlawfulness of Tenn. Code Ann. § 39-13-604 at the time of the defendant's conduct that a reasonable officer would not have known his actions were unlawful.

IV.

For the reasons stated above, the defendant's motion (Docket Entry No. 15) for summary judgment is granted. As the Court dismisses with prejudice the plaintiff's federal claims against the defendant, it declines to exercise supplemental jurisdiction over the plaintiff's pending state claims. *See* 28 U.S.C. § 1367(c)(3); see also *Cameron v. Seitz*, 38 F.3d 264, 276 (6th Cir. 1994) ("With the dismissal of the [federal] claim, original jurisdiction over the state ... claim is lacking, and the district court has discretion as to whether to continue to exercise supplemental jurisdiction over

it."). Thus, the Court shall dismiss without prejudice the plaintiff's state claims of false light and invasion of privacy.[11]

An appropriate order shall be entered.

/s/ _____
Thomas A. Higgins
United States District Judge
10-10-02

ORDER

In accordance with the memorandum contemporaneously entered, the defendant's motion (filed July 19, 2002; Docket Entry No. 15) for summary judgment is granted.

Accordingly, the plaintiff's federal claims are dismissed with prejudice. The plaintiff's state claims of false light and invasion of privacy are dismissed without prejudice.

The entry of this order shall constitute the judgment in this action.

It is so ORDERED.

/s/ _____
Thomas A. Higgins
United States District Judge
10-10-02

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[11] As stated in note 1 supra, the plaintiff conceded that summary judgment should be granted as to his claim for malicious prosecution.